EDITORIAL NOTES.

By W. D. L.

The Interstate Commerce Commission Again. The Party Rate Question.

In the last number of this periodical we had a few words to say in regard to the Interstate Commerce Commission. What was then said was suggested by a perusal of the recently published report of that body, and related chiefly to the legal status of the Commission, and to the various attitudes which Congress might adopt toward it.

There is another matter in this connection which may be commented upon with profit. It is the final settlement by the Supreme Court of the "Party Rate Question."

As far back as July 10, 1889, the Pittsburg, Cincinnati & St. Louis Railroad Company filed its complaint against the Baltimore & Ohio Railroad Company.[1] The ground of the complaint was that the defendant company, being a competitor of the plaintiff, issued what is known as party rate tickets. A party rate ticket is a single ticket good for a single fare for a specified number of persons. They were issued by the Baltimore & Ohio Railroad Company to any one who chose to apply, and were sold at a reduced rate over the rate for a single person for a single fare. That is, one who traveled in a party could travel more cheaply than one who was traveling alone. The decision of the Commission, delivered by Mr. Commissioner Veazey, was made on February 21, 1890. It was in favor of the plaintiff. In other words, party rate tickets were declared illegal under the Interstate Commerce Act.

The ground for this decision on the part of the Commission was two-fold. The Act provides, § 1, that "All charges made for any service rendered . . . in the transportation of passengers . . . shall be reasonable

1. Interstate Com. Com. Rep., 572.

and just." Section 2 further adds "that if any common carrier . . . shall . . . collect or receive from any person or persons a greater or less compensation for any service, etc. . . . than it charges . . . any other person or persons for doing . . . a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, such common carrier shall be guilty of an unjust discrimination." . . . § 3 makes it unlawful "to give any particular person any unreasonable preference or advantage." Section 22, as amended by § 9 of Act of March 21, 1889,[1] says: "That nothing in this Act shall prevent . . . the issuance of mileage, excursion or commutation passenger tickets." The Commission read these sections in the light of the assumption that Congress, in forbidding unjust discrimination, meant to include in the terms "unjust discrimination" any difference in the same service to each individual, and that as it was necessarily the same service to A, who was taken from X to Y, as it was to B, a member of a party of ten, who was taken between the same points, he should be charged the same price. In accordance with this reasoning, the Commission consider that all discrimination is against the terms of the Act, and had it not been for § 22, all excursion, commutation and mileage tickets would have been unlawful.

Thus, in showing the discrimination which exists where party rate tickets are issued, Commissioner VEAZEY says: "It is difficult to see how this individual equality is preserved in a carload of say nineteen persons, all starting from the same destination, if ten of them pay two cents per mile each and the other nine three cents." This reasoning would apply with equal force to commutation or excursion tickets. But the position of the Commission is still more plainly seen in another part of Commissioner VEAZEY'S opinion, where we read, in answer to the arguments of the Baltimore & Ohio Railroad Company, that the order of the Commission would drive theatrical mana-

[1] Stats. at Large, 855–862.

gers from the business, that "as the ticket cannot be sustained on the ground of equality of service and rate, and is not embraced within the accepted classes, this Commission has no power to furnish relief."

The order of the Commission was disregarded by the Railroad Company. The Commission then appealed to the Circuit Court for the Western District of Ohio for an injunction to restrain the Baltimore and Ohio Railroad Company from issuing party rate tickets. The Circuit Court gave its decision on August 11, 1890. They denied the injunction on the ground that party rate tickets were not forbidden by the Interstate Commerce Act. Both Judges JACKSON and SAGE delivered opinions.[1] Judge JACKSON thought that a party rate ticket was fairly included under the exception in § 22 of the Act in favor of commutation tickets. He also thought that, even if this contention could not be maintained, as the discrimination between parties of ten and a single person was not an unjust discrimination, it was unobjectionable.

Judge SAGE, on the other hand, though he reached the same conclusion, that party rate tickets could fairly be said to be commutation tickets, did not agree with Judge JACKSON in thinking that any discrimination was allowable under the Act except an unjust discrimination.

Whether any just discrimination is prevented by the Act, or rather, whether every discrimination must be proved unjust before being condemned, depends on the proper construction of § 2, which forbids different charges for "*a like and contemporaneous* service." Judge JACKSON asks: "When a carrier's charges are reasonable and just, how can they be regarded or treated as constituting an *unjust* discrimination under § 2?"

But § 2 does not say anything about an unjust discrimination, and thus we find Judge SAGE acknowledging that "if those traveling under party rate tickets are charged less than other individuals for like and contemporaneous services, under substantially the same circumstances and

[1] 43 Fed. Rep., 37.

conditions, *it is conclusive*, and the issuance of the tickets must be adjudged unlawful. This, which was also the position of the Commission, appeals to us as the only possible interpretation of § 2 of the Act. The real difference between Judge SAGE and the Commission lay in the different interpretation which each put on the intent of § 22. The Commission, as we have said, read § 22 of the Act as making exceptions to certain classes of cases which § 2 had declared unlawful. As opposed to this view, Judge SAGE says: "The true construction of the section appears to be that it specified certain discriminations, not regarded by Congress as within the letter or spirit of the Act, and, therefore, it provides that the Act shall not be construed to prevent them; and the instances given are illustrative rather than exhaustive. It is a section furnishing an express rule of construction." In other words, that the section furnishes an index of how § 2 shall be construed, and as "these tickets are in principle in no wise different from mileage, excursion and commutation tickets," this would render them lawful as far as the Act is concerned.

The word *same* is, perhaps, as treacherous an instrument to convey definite ideas as any in our language. Where we shall draw the line as to what is the "same service" is largely a matter of choice. The distance from A to B is the same as from C to D. Is it the same service to take one from A to B as from C to D? The conditions whose contemporaneous existence is necessary to fulfil the conditions of the "same service" are, unless Congress has given a rule of interpretation, entirely a matter of individual choice. Congress, in § 22, when it provided that nothing in the Act should prevent the issuance of commutation, mileage tickets, etc., gave a rule of construction. It either, as the Commerce Commission contended, prohibited every other form of ticket except the ones excepted from the operation of the section, and in so doing showed that § 2 considered a commutation and a single ticket as providing the same service for different rates; or, as advocated by Judge SAGE, § 22 showed that commutation tickets were

not the same service as single tickets, within the meaning of § 2.

Whether A, who takes a single ride, has the same service performed for him, within the meaning of the Interstate Commerce Law, as one who is taken once out of thirty times, or whether to carry a single man is the same service as to carry one man out of ten, largely depends, in our estimation, on what the Act was meant to prevent. This we find from § 1 and § 3. *First*, the Act was intended to prevent any charges from being unjustly high; *Second*, it was made to prevent discrimination between individuals; *Thirdly*, it meant to restrain unjust favoritism to any particular class of people under any particular conditions. The particular rates given on party rate tickets may offend against the third purpose of the Act, but not against the other two, if these tickets are open to all people traveling in parties. There is a difference between contracting to take a party and contracting separately to take several individuals. It is the difference between wholesale and retail. Whenever there is a difference in service this fact justifies a difference in fare, but the difference should not be so great as to discriminate unjustly against the class desiring one service and not the other.

This was substantially the argument adopted by Mr. Justice BROWN when he delivered the opinion of the Supreme Court affirming the decision of the Circuit Court.[1]

In conclusion, there is one other point which we wish to speak of. We have said that one of the purposes of the Act was to prevent unjust discriminations between different classes of people. On this we question a criterion of a just discrimination laid down by Mr. Justice JACKSON. It had been proved that both the rate for a party of ten and for a single passenger, charged by the Baltimore & Ohio Railroad Company, were reasonable, yet it was contended that the difference was an unjust discrimination against the single passenger. Mr. Justice JACKSON asks: "How can this position (in view of this fact) be sustained?" And

[1] Decided May 16, 1892, reported 5 Int. Com. Com. Rep., 92.

yet might there not be such a difference between different classes of traffic as to operate unjustly against the one charged the higher rate, even though either rate, in the light of the general receipts and expenses of the road, might be considered unjust?

While perhaps most lawyers will agree with the interpretation put upon the Act in this party rate question by the courts, all will regret the necessity which led the courts to overrule the Commission. If the Commission were a court and a part of the Federal system, it would be different. The decisions of a lower tribunal may be reversed by a superior, and yet people regard the "Courts" in a certain sense as "one," and the dignity of judicial proceedings is not affected. But when a court refuses to enforce an order made after solemn deliberation, and made by a body whose acts and deliberations are all of a judicial nature, it throws ridicule and contempt upon the whole proceeding. The spectacle of a body judicially investigating a case, issuing solemn orders, then running into court begging to have their order enforced and being met with the statement that their decision is not law, is far from being an edifying one. It is a spectacle which cannot but diminish the popular respect for judicial tribunals, and the sooner the reproach is taken away from our midst, the better it will be both for Courts and suitors.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the following month].

PRACTICE IN COURTS OF REVIEW THAT SUBSTANTIALLY FOLLOW THE COLORADO PROCEDURE. By JOHN C. FITNAM. Chicago: E. B. MYERS Co., Law Publishers, 1893.

THE LAW OF ASSIGNMENT FOR THE BENEFIT OF CREDITORS IN THE STATE OF ILLINOIS. By SYDNEY RICHMOND TABER. Chicago: E. B. Myers Co., Law Publishers, 1893.

A TREATISE ON THE ADMISSIBILITY OF PAROL EVIDENCE IN RESPECT TO WRITTEN INSTRUMENTS. By IRVING BROWNE. New York: L. K. Strouse & Co., 1893.